NUMBER 21-9999

UNITED STATES COURT OF APPEALS

FOR THE FIFTEENTH CIRCUIT

CARL FORD,

APPELLANT,

v.

WILLIAM PRICE,

APPELLEE.

BRIEF OF APPELLEE

On Appeal from the United States District Court

For the Southern District of Bayside

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STATEMENT OF JURISDICITON

The District Court of Bayside enjoyed subject-matter jurisdiction over this matter pursuant to 28 § U.S.C. §§1331 and 1343 because Federal Courts have general jurisdiction over all matters of law. This action was brought by William Price ("Price") against Carl Ford ("Ford") under 42 U.S.C § 1983. This Court of Appeals enjoys jurisdiction under 28 U.S.C. § 1291 because "courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . ." 28 U.S.C.A. § 1291.

STATEMENT OF THE ISSUES

I. Should the *Tinker* standard apply to non-threatening off-campus student speech allowing a school official to discipline the student based on his off-campus speech if the school official believes the speech is forecasted to cause a disruption in the school?

II. Does a broad right of a student to exercise free speech off-campus under the First Amendment constitute a "clearly established" right to overcome the qualified immunity defense?

STATEMENT OF THE CASE

Price filed a lawsuit with the United States District Court alleging that Ford violated his right to freedom of speech under the First Amendment. On May 21,

2021, Ford filed a Motion for Summary Judgment, which the District Court denied. On December 1, 2020, a Bench Trial commenced and at trial, the court found in favor of Price, holding: (1) Plaintiff's off-campus social media post was not rendered "on-campus" merely because it mentioned his Coach and was accessed by some students because it did not substantially reach the school or constitute a threat, therefore, *Tinker* did not apply; and (2) that student's right to freedom of speech away from school campus under the First Amendment constitutes a "clearly established" right, and Defendant in fact violated that right, thus, Defendant was not entitled to qualified immunity. R. at 23. Ford's appeal ensued. *Id.*

Factual Background

On September 12, 2019, Ford, Head Coach for the football team at Bayside Lights High, provided players with a pre-order form to take home and fill out to return with their appropriate size for pink jerseys to wear throughout the month of October in honor of breast cancer awareness month. R. at 19. Disgruntled with the idea of wearing pink while playing football, Price, an eleventh grade, seventeen-year-old boy, turned to his private Instagram to vent his frustrations. *Id*.

On September 16, 2019, while in his bedroom, Price made a private post, on his phone, viewable to only fifty followers (hereinafter "the post"): "Can't believe Coach is making us wear PINK to play FOOTBALL for an entire month next month, how dumb is that???? Too bad I'll show up repping the 'ol black and

maroon. Ugh I would not be caught dead wearing pink any time much less for breast cancer awareness playing football!" R. at 21. Price created the post after school hours, without school resources, on a social media platform unaffiliated with the school and never intended for the post to reach Ford or the school. R. at 17. Price made the post to complain about wearing pink, but ultimately intended on returning the completed jersey form to Ford. *Id.* Only two friends of Price approached him to say "dude, why are you so insensitive?" and "dude, you're an idiot". R. at 18.

On Monday, September 19, 2019, before providing Price with the opportunity to return the jersey form, Ford learned of the post by one of Price's teammates and took disciplinary action against Price by removing him from the team. R. at 20. With a personal connection to breast cancer, Ford viewed Price's post as "disrespectful" to him, the school and Price's teammates. *Id.* Additionally, Ford contends that the team would be upset if Price was the only player not wearing pink because it would be unfair to the other players and questions would be raised amongst students at football games. *Id.* However, "the post neither created nor was it calculated to create any disruption of school activities." R. at 7.

SUMMARY OF THE ARGUMENT

Tinker does not apply to off-campus speech and therefore does not apply to Plaintiff's social media post because the post was made off-campus and did not

cause a material and substantial interference with the school's activities or its learning environment. In addition, even if *Tinker* does apply to Plaintiff's post, the post fails to satisfy both the reasonably foreseeable and sufficient nexus test because the post was not reasonably forecasted to cause a material disruption. In addition, Ford violated Plaintiff's clearly established right to free speech under the First Amendment. Price's clearly established right to freedom of speech is one that a reasonable person in Ford's position should know and therefore, Ford is not entitled to qualified immunity.

STANDARD OF REVIEW

The standard for appellate review of a judgment below on appeal of a Bench Trial Order is *de novo*, "considering the matter anew as though no decision were rendered below" and giving no deference to the analysis of the District Court. *In re Traverse*, 753 F.3d 19, 25 (1st Cir. 2014). The appellate court "is free to draw its own conclusions of law and fact" and render a decision based on its own judgment. *Hottenroth v. Vill. of Slinger*, 388 F.3d 1015, 1036 (7th Cir. 2004).

ARGUMENT

For the following reasons, Price's post is not subject to *Tinker* because Price created the post entirely off-campus and presented a non-disruptive, non-threatening opinon that did not rise to a material and substantial disruption and does not satisfy the reasonably foreseeable or sufficient nexus test. *Tinker v. Des*

Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969). Additionally, Defendant Ford is not entitled to qualified immunity because Plaintiff Price has a clearly established right to freedom of speech under the First Amendment which a reasonable official would know.

Under the Fourteenth Amendment, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Under the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . ." U.S. Const. amend. I.

I. Plaintiff's off-campus speech is protected under the First Amendment and *Tinker* does not apply because Plaintiff's post was made off-campus and did not create a material and substantial interference with the school's activities.

For the following reasons, *Tinker* is inapplicable in this case and Price's post does not satisfy the reasonably foreseeable or sufficient nexus test because an actual disruption did not occur, and the facts do not indicate a reasonable forecast of material disruption. *Tinker*, 393 U.S. 503 at 513. In addition, Price's post fails to satisfy the sufficient nexus test because the nexus of Price's post to the high school's pedagogical interests is not sufficiently strong to justify action taken by

Ford. *See Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008); *Kowalski v. Berkeley Cty. Sch*, 652 F.3d 565 (4th Cir. 2011).

Tinker established school official's ability to regulate on-campus student speech that may materially and substantially interfere with school activities or disrupt the schools learning environment, without violating the First Amendment. *Tinker*, *393* U.S. 503 at 506. Since *Tinker*, the Supreme Court has made several narrow exceptions to the standard. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 390 (5th Cir. 2015). However, these narrow exceptions do not apply to this case. *See Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 265 (1988) (holding school officials may discipline student speech that is school-sponsored); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986) (holding the vulgar, lewd, and offensive student speech is not protected under the First Amendment); *Morse v. Frederick*, 551 U.S. 393, 407-8 (2007) (holding school officials ability to regulate student speech that promotes the illegal drug use).

Thus, under the *Tinker* standard, off-campus student speech is protected under the First Amendment unless one of the aforementioned exceptions apply or there is a reasonable forecast of material disruption. *Tinker*, 393 U.S. 503 at 513. For the following reasons, *Tinker* does not apply to Price's off-campus social media post.

A. *Tinker* does not apply to Plaintiff's off-campus social media post because the post raised no on-campus school concerns and the post was a mere expression of opinion that did not amount to a material and substantial disruption in the school's activities or learning environment.

The *Tinker* standard relates to school official's ability to discipline students for their on-campus speech that reasonably forecast a material and substantial disruption. *Tinker*, *393* U.S. 503 at 506. In *B.L. v. Mahanoy*, the Third Circuit provided that "*Tinker* does not apply to off-campus speech – that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." 964 F.3d 170, 189 (3d Cir. 2020). In *Mahanoy*, the court held that *Tinker* does not apply to the student's off-campus social media speech. *Id.* at 189. Furthermore, in designating the student's speech as off-campus, the court yielded insight from *J.S.* and *Layshock* to highlight that "a student's online speech is not rendered on-campus simply because it involves the school, mentions teachers or administrators, is shared with or accessible to students, or reaches the school environment." *Id.* at 180. *See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920 (3d Cir. 2011); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 208 (3d Cir. 2011); (designating the student's creation of fake Myspace profiles of a school official, in both cases, as off-campus speech despite mentioning facets of the school and sharing the profile with members of the school).

Beyond the Third Circuit's interpretation, *Tinker*'s application to off-campus speech is inapplicable "in absence of demonstration of any facts which might reasonably have led school authorities to forecast substantial disruption of, or material interference with, school activities or any showing that disturbances or disorders on school premises." *Tinker*, *393* U.S. 503 at 515. *See Mahanoy*, 964 F.3d at 180 (finding the facts did not support a reasonable forecast of material disruption because the post was made entirely off-campus); *See also Layshock*, 650 F.3d at 208; *J.S.*, 650 F.3d at 928 (holding despite mentioning the school and fellow students viewing the social media post, those few points of contact are not enough to render the student's speech on-campus or rise to a reasonable forecast of material disruption).

Additionally, under *Tinker* students are entitled to First Amendment protection for mere expressions of opinion and officials are not permitted to discipline these opinions, even those that are controversial. *Tinker*, *393* U.S. at 513. For school officials to "justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 510. "

Conversely, when a student's speech is categorized as threatening, harassing, intimidating and posing risk to student safety, the distinction between

off-campus and on-campus speech is irrelevant because the nature of the speech will inherently reach the school and substantially disrupt the school's environment. *See Bell*, 799 F.3d at 390 (finding the threatening, harassing, and intimidating student speech reasonably forecasted a material disruption within the school); *See also R.L. v. Cent. York Sch. Dist.*, 183 F. Supp. 3d 625, 640 (M.D. Pa. 2016) (holding *Tinker* applied to the student's off-campus social media post regarding a bomb threat to the school because nature of the speech concerned school safety).

Here, Price created a social media post, off-campus, after school hours, and without school resources to express an opinon about his discomfort with wearing the color pink while playing football. Under *Mahanoy*, *Tinker* does not apply to Price's post because it was created entirely off-campus. While the post contained language indicating the school colors and "my coach," the court in *J.S.* and *Layshock* held those few points of contact are not enough to render Price's post as on-campus speech. Additionally, *Tinker* does not apply because Price's post presented a mere expression of opinion that did not create a material and substantial disruption or a reasonably foreseeable disruption.

It is well established that *Tinker* does not permit the discipline of mere expressions of opinion, even those that are controversial, unless that speech materially and substantially interferes with the requirements of appropriate discipline in the operation of the school or collides with the rights of others. For

Ford to justify prohibition of a Price's expression of opinion, Ford must be able to show that the disciplinary action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. The facts show Ford took disciplinary action against Price because he was "disrespected" by the post and the post neither created nor was it calculated to create any disruption of school activities.

Despite the sensitivity that accompanies breast cancer, the opinion presented in Price's post was not one that materially and substantially interfered with the requirements of the school's operations or infringed on the rights of others. Ford is unable to show that his disciplinary action was based on anything more than mere conjecture and discomfort with the Price's post. While the post could be regarded as immature and controversial, the speech could not give rise to the level of substantial disruption *Tinker* aims to prevent because the facts show that only one student reported the post to Ford, and only two students confronted Price about the post to merely call him an "idiot" and "insensitive." Additionally, Price's off-campus social media post is not subject to *Tinker* because the post did not contain threatening, harassing or intimidating language.

Therefore, *Tinker* does not apply to Price's off-campus social media post because the post was a mere expression of opinion that did not amount to a material and substantial disruption in the school's activities or its learning

environment. Whether this court chooses to align their ruling under *Tinker*, the Third Circuit or the Fifth Circuit, the outcome is the same because Price's post was made off-campus, is a mere expression of opinion that did not result in a material disruption, or include threatening, harassing, and intimidating language. For the following reasons, Price's post does not apply to the reasonably foreseeable or sufficient nexus test.

B. Even if *Tinker* applies to off-campus speech, Ford violated Plaintiff's First Amendment right because there was not a reasonable forecast of a substantial disruption and there was not a sufficient nexus between Plaintiff's post and the school's pedagogical interests.

In applying *Tinker* to off-campus speech, the Second and Fourth Circuits utilized two different standards, a reasonably foreseeable standard and a sufficient nexus test. For the following reasons, Plaintiff's counsel urges this court to find that neither tests apply to Price's post.

1. Plaintiff's post is protected by the First Amendment because the non-threatening, opinionated nature of the speech within the post and mention of "coach" and school colors is not a sufficient basis to reasonably lead Ford to forecast a material disruption.

Under the reasonably foreseeable test, school officials may discipline a student for their off-campus speech when their speech "would foreseeably create a risk of substantial disruption within the school environment, at least when it is similarly foreseeable that the off-campus expression might also reach campus." *Doninger*, 527 F.3d at 48. It is not necessary to determine whether actual disruption

will occur, "but whether school officials might reasonably portend disruption from the student expression at issue." *Id.* at 51.

Accordingly, facts and the totality of the circumstances of the students off-campus expression must reasonably lead school officials to forecast substantial disruption of or material interference with school activities or its learning environment. *See LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) ("to suppress student speech, school officials must justify their decision by showing facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities"); *See also Doninger*, 527 F.3d at 53 (holding the facts indicate a reasonable forecast of material disruption because the student's intent on writing the speech was to entice others to speak out against the purported event cancellation); *Bell*, 799 F.3d at 387 (finding reasonable forecast of material disruption based on the threatening, harassing, and intimidating nature of the speech); *contra Shanley v. Northeast Independent Sch. Dist., Bexar Cty., Tex*, 462 F.2d 960, 974 (5th Cir. 1972); *Layshock*, 650 F.3d at 214 (holding student punishment unconstitutional because the facts did not support a reasonable forecast of disruption based on the student's use of the principal's picture on social media site and student's interaction with social media site did not give rise to the level of disruption required).

Courts consider the following factors for the totality of the circumstances: "nature and content of the speech, severity of the possible consequences should the speaker take action, relationship of the speech to the school, intent to keep speech private, seriousness of speech, manner in which the speech reached the school community and the occurrence of other in-school disturbances." *Bell*, 799 F.3d at 398.

Here, Price's post did not create a reasonable forecast of a material disruption. In order to justify Ford's disciplinary action, there must be facts and circumstances which might reasonably lead to the forecast of substantial disruption of or material interference with school activities. Dissimilar to *Doninger*, Price made an opinionated post to a private social media account because he did not intend for the post to reach the school and did not intend to take action or entice others to take action. Rather, Price intended on turning in the jersey form with his size. However, Ford never afforded Price the opportunity to turn in the jersey form because Ford preemptively disciplined Price based on his discomfort with the post and contention that a disruption would occur, despite the lack of factual circumstances indicating a reasonable forecast of material disruption. To say that a substantial and material disruption would occur from the opinion stated in Price's post would be stretching the reasoning of *Doninger* to include speech that is unpopular and creates discomfort, the exact speech *Tinker* precludes.

Under *Bell's* totality of the circumstances, Price's post does not reasonably forecast a material disruption because the facts show that only one student brought the post to Ford's attention, only two students confronted Price making minimal comments calling him "insensitive" and "stupid", and the post neither created nor was it calculated to create any disruption of school activities. Additionally, as *J.S.* and *Layshock* indicated, Price's mention of "coach" and school colors is not enough to reasonably forecast a material disruption.

Therefore, Price's post did not create a reasonable forecast of material disruption. As the facts indicate, Price intended on turning in his jersey form. Ford did not afford him this opportunity and took unjustified and unconstitutional disciplinary action against him. Given the totality of the circumstances, the post was created entirely off-campus, after school hours, without school resources, and Price never intended to take action or entice others to take action, thus, the facts do not support a reasonable forecast of material disruption occurred.

2. Price's post is entitled to First Amendment protection because limited connection mentioning "coach" and school colors is insufficient to forge a sufficient nexus between Plaintiff's off-campus speech and the school's pedagogical interests.

Applying *Tinker* to off-campus speech, the Fourth and Nineth Circuits set forth the sufficient nexus test which provides that, school officials are permitted to discipline students when the student's off-campus speech is sufficiently connected to the school's pedagogical interests. *See Kowalski*, 652 F.3d at 565; *C.R. v.*

Eugene Sch. Dist. 4J, 835 F.3d 1142, 1145 (9th Cir. 2016). Courts have used the sufficient nexus test to justify discipline of a student's off campus speech when the nature of the speech is harassing, bullying, threatening, or defamatory. *See Kowalski*, 652 F.3d at 574 (holding a sufficiently strong connection between the student's off-campus speech and the school's pedagogical interests to justify discipline because the student could reasonably expect her speech to reach the school given the targeted, defamatory nature of the student's speech, aimed at a fellow classmate, it created substantial disruption in the school. *See also Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38 (2d Cir. 2007) (finding a sufficient nexus between the school's pedagogical interest and the student's threatening depiction of killing a school official was sufficiently strong to justify action).

Conversely, Courts have found the sufficient nexus test inapplicable when the student's speech takes place off-campus and contains limited connection to the school because the limited connection is insufficient to forge a nexus between the off-campus speech and a substantial disruption at school. *See Layshock*, 650 F.3d at 214 (finding the student's use of the principal's picture on his off-campus social media post was too limited to sufficiently connect the speech to the school pedagogical interests); *See also Thomas v. Board of Educ.,* 607 F.2d 1043 (2d Cir.

1979) (holding that all but an insignificant amount of relevant activity regarding the student speech was designed off-campus).

Here, the nexus of Price's post to the high school's pedagogical interests is not sufficiently strong to justify action taken by Ford because Price's mention of "coach" and "ol' black and maroon" is too limited to establish a sufficient connection to the school's pedagogical interests. Unlike *Kowalski*, Price's post did not target a specified person and did not contain threatening, harassing, or defamatory language. Instead, Price's post presented an opinion with his discomfort for wearing pink while playing football and the mention of "coach" and school colors is not enough to forge a nexus between the off-campus speech and the school's pedagogical interests. Therefore, Price's post is entitled to First Amendment protection because the post does not satisfy the sufficient nexus test.

II. Ford is not entitled to qualified immunity because Price's First Amendment right to free speech right was clearly established at the time Ford's disciplinary action occurred and a reasonable person in Ford's situation would know a student has a right to make off-campus opinionated, non-disruptive, non-threatening, social media posts under the First Amendment right to free speech.

For the following reasons, Ford is not entitled to qualified immunity because the First Amendment right to free speech was clearly established at the time the disciplinary action occurred and a reasonable person would know a student has a right to freedom of speech under the First Amendment. The defense of qualified

immunity applies to government officials and "offers these individuals complete protection if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Penley v. Eslinger*, 605 F.3d 843, 849 (11th Cir. 2010). A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Stamps v. Town of Framingham,* 813 F.3d 27, 33 (1st Cir. 2016). The Supreme Court established an objective-reasonableness test which provides "qualified immunity protection to all but the plainly incompetent or those who knowingly violate the law." *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991). To overcome the defense of qualified immunity, the plaintiff must prove: (1) that the defendant violated his constitutional right, and (2) that the constitutional right was clearly established at the time of the alleged unlawful activity. *Hunt v. Bd. of Regents of Univ. of New Mexico*, 792 F. App'x 595, 600 (10th Cir. 2019).

A. Plaintiff has a clearly established right under the First Amendment because the off-campus post was non-threatening and non-disruptive to the school environment.

Under the defense of qualified immunity, "a right is clearly established when, based upon the law at the time of the incident, it is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Hunt* 792 F. App'x at 601. The application of *Tinker* as it relates to off-

campus speech is clear: student speech made off-campus is "protected under the First Amendment and not punishable by school authorities unless they are true threats or are reasonably calculated to reach the school environment *and* are so egregious as to pose a serious safety risk or other substantial and material disruption in that environment." *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1140 (D. Minn. 2012). See also *Sagehorn v. Indep. Sch. Dist. No. 728*, 122 F. Supp. 3d 842, 862 (D. Minn. 2015) (holding school officials were not entitled to qualified immunity because the student's off-campus speech was non-threatening and in no way impacts or disrupts the school environment and thus, the student had a clearly established right to freedom of speech).

Consequently, there is not a clearly established right to First Amendment protection for off-campus student speech that results in an actual or substantial disruption of the school environment. *See Doninger*, 527 F.3d at 52 (holding that the student's off-campus internet post "created a foreseeable risk of substantial disruption to the work and discipline of the school" because the content of the post enticed fellow students to take action against the purported school event cancellation). Additionally, a student does not have a clearly established right to freedom of speech when they limit their speech, either intentionally, by contract, or inadvertently, by conduct. *See Longoria Next Friend of M.L. v. San Benito Indep.*

Consol. Sch. Dist., 942 F.3d 258, 263 (5th Cir. 2019) (student agreed, in writing, that her off-campus social media posts would be subject to disciplinary action under the Cheerleading Constitution, and because of this the student did not have a clearly established right to free speech); See also *Yeasin v. Durham*, 224 F. Supp. 3d 1194, 1199 (D. Kan. 2016) (student did not have a clearly established right to freedom of speech because the school issued the student a no contact letter which prohibited comments on any social media account about a particular student, the letter further provided that any violation may result in expulsion).

Here, Price has a clearly established right to freedom of speech under the First Amendment of the Constitution. The facts of this case place Price's post in the category of protected, nonviolent, nondisruptive, off-campus speech because the post merely indicates Price's opinion of not wanting to wear pink while playing football. As stated by *R.S.*, student speech made off-campus is protected under the First Amendment and not punishable by school authorities unless they are true threats or are reasonably calculated to reach the school environment *and* are so egregious as to pose a serious safety risk or other substantial disruption in that environment.

Dissimilar to *Doninger*, Price has a clearly established right to free speech because Price never intended for the post to reach the school and did not encourage others to cause a disruption in school. In contrast to *Longoria* and *Yeasin*, Price did

not limit his First Amendment right to free speech by contract or unlawful conduct. Similar to *Sagehorn*, Price's off-campus social media post is non-threatening and in no way impacts or disrupts the school environment. Thus, Price has a clearly established right to freedom of speech. The facts of this case show that Price's post took place entirely off-campus, and there was not a reasonable forecast of material disruption to the school environment as a result of the post or a substantial and material disruption caused by the post. Therefore, given the non-threatening, non-disruptive nature of Price's off-campus opinionated post, Price has a clearly established right to freedom of speech.

B. A reasonable person in Ford's position should have known that the disciplinary action taken against Price would violate his constitutional right to freedom of speech because the speech was opinionated, non-disruptive and did not involve school safety.

The defense of qualified immunity requires the court to determine if, objectively, a reasonable person in the defendant's position should know about the constitutionality of the conduct the school official is disciplining. *Doninger*, 642 F.3d at 345-46. In assessing the reasonableness of the official's actions, the official's action must be viewed in light of the "facts available to him at the time of his action and the law that was clearly established at the time of the alleged illegal acts." *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 614 (5th Cir. 2004).

The general rule for a student's First Amendment right to free speech on the internet is "that schools cannot regulate merely inappropriate out-of-school speech,

and reasonable school official would understand that punishing student's use of personal property to make non-threatening off-campus speech that in no way impacted or disrupted school environment would violate student's clearly established right." *Sagehorn*, 122 F. Supp. at 862. In *Sagehorn*, school officials were not entitled to qualified immunity and the court found that "a reasonable school official would understand that punishing such speech would violate the students clearly established right" to free speech because the nature of the speech is non-threatening and "in no way impacts or disrupts the school environment." *Id.* at 862. *See Doninger*, 642 F.3d at 344 (while a student's right to free speech may be limited in light of the special characteristics of the school environment, a student's right to free speech beyond the schoolhouse gates is protected by under the First Amendment when the speech does not substantially and materially disrupt the school environment). *See also Morse*, 551 U.S. at 394 (quoting *Fraser*, 478 U.S. at 682) (holding that had the student delivered the same speech in a public forum outside the school context, he would have been entitled to First Amendment protection. "In school, however, his First Amendment rights were circumscribed in light of the special characteristics of the school environment").

Accordingly, case law supports the proposition that "coaches may not penalize players for engaging in speech activity which does not create substantial disorder, materially disrupt class work, or invade the rights of others." *Seamons v.*

Snow, 206 F.3d 1021, 1030 (10th Cir. 2000). In *Seamons*, the football coach was not entitled to qualified immunity for his action of suspending and removing a student from the football team because coaches "may not penalize students for their speech when that speech is non-disruptive, non-obscene, and not school-sponsored." *Id.* at 1031. *See also Boyd v. Bd. of Directors of McGehee Sch. Dist. No. 17*, 612 F. Supp. 86, 93 (E.D. Ark. 1985) (holding the football coach violated the players right to freedom of speech after suspending them from the team); *Compare Lowery v. Euverard*, 497 F.3d 584, 588 (6th Cir. 2007), *with Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995) (obscuring the line between the First and Fourth Amendment by establishing that student's voluntarily subject themselves to a higher degree of regulation than students normally and have a reason to expect intrusion on normal rights and privileges).

In cases where the school official was entitled to qualified immunity protection for violating a student's First Amendment right to free speech, the facts present unique situations that are not analogous to those in the present case where the student's speech involved school safety or disruption to school. *See McKinney as Next Friend of K.P. v. Huntsville Sch. Dist.*, 345 F. Supp. 3d 1071, 1076 (W.D. Ark. 2018) (school officials entitled to qualified immunity against free speech claims arising from the suspension of a student for off-campus social media speech alluding to a school shooting); *See also Morse*, 551 U.S. at 395 (school official

entitled to qualified immunity because a reasonable school official would interpret the students "BONG HiTS 4 JESUS" banner as promoting illegal drug use); *Porter*, 393 F.3d at 620 (5th Cir. 2004) (student's off-campus drawing depicting violent siege on school was brought to school, unintentionally, two-years later by third-party was subject to First Amendment protection, however, due to the unlawful nature of the drawing, the official acted as a reasonable school official would in sanctioning the student and thus was entitled to qualified immunity); *Morgan v. Swanson*, 659 F.3d 359, 382 (5th Cir. 2011) (school official entitled to qualified immunity protection for restricting the distribution of written religious materials).

Here, a reasonable official, in Ford's situation, would know that Price's off-campus social media post is protected under the First Amendment because the speech did not involve school safety or involve facts indicating a reasonable forecast of material disruption. Price's post falls under the general rule outlined by in *Sagehorn* which provides a student's First Amendment right to free speech on the internet is that schools cannot regulate merely inappropriate out-of-school speech, and reasonable school officials would understand that punishing student's use of personal property to make non-threatening off-campus speech, that in no way impacted or disrupted school environment, would violate a student's clearly established right. Price's post was made off-campus, after school hours, without

school resources, and on a private social media account unaffiliated with the school. While the post contained an immature opinion and language mentioning facets of the school, "coach" and "'ol black and maroon," the post presented a mere expression of opinion that did not involve school safety or cause a reasonable forecast of material disruption. Additionally, the principal, superintendent and school board only decided not overturn Ford's decision, they did not explicitly support the decision or inquiry into the reasonableness of the decision because the school gave Ford ultimate discretion to terminate and reinstate players as he pleases.

The reasonableness of Fords decision turns to whether a school official, in the same situation, would know that the disciplinary action would violate the student's constitutional right. As stated by *Seamons,* coaches may not penalize players for engaging in speech activity which does not create substantial disorder, materially disrupt class work, or invade the rights of others. Ford's decision was objectively unreasonable, and a reasonable school official, in the same situation, would not have acted the way Ford did. In *Sagehorn*, the court concludes that a reasonable school official, specifically a football coach, would understand that punishing a student for their off-campus speech that in no way impacts or disrupts the school environment would violate the student's clearly established right to free speech. In light of *Seamons*, Ford's decision was objectively unreasonable, as a

reasonable official in Ford's position would understand that punishing Price for his off-campus, opinionated, non-threatening, non-disruptive social media post was a violation of Price's First Amendment right to free speech. Therefore, Plaintiff's counsel urges this court to find that Ford is not entitled to qualified immunity because Ford did not act as a reasonable official would, in the same situation.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests this court uphold the decision of the District Court.

Dated: July 23, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, *Snowboarding Tahoe*, the undersigned student of the Charleston School of Law, hereby certify that this document was prepared in compliance with the established Local Rules and further that I have neither given nor received inappropriate assistance during the preparation of this document.

/s/ *Snowboarding Tahoe*

CERTIFICATE OF SERVICE

I, *Snowboarding Tahoe*, attorney for William Price, certify that I will serve all counsel with a copy of the Brief for Appellee by e-mailing a copy to opposing counsel by July 23, 2021:

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